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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RACHEL LAWRENCE, Defendant and Appellant.	A153658 (Napa County Super. Ct. No. CR182014)

Rachel Lawrence appeals following the trial court's order revoking her probation. She argues the trial court erred in admitting hearsay evidence at the revocation hearing without good cause. We agree.

BACKGROUND

In May 2017, appellant pled no contest to assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and misdemeanor resisting a peace officer (§ 148 subd. (a)(1)), and admitted a prior prison term (§ 667.5, subd. (b)).[2] In August, the trial court placed appellant on probation for three years. One of the probation conditions required appellant to "[e]nroll in and successfully complete The Integrated Services for Mentally Ill Parolees (ISMIP) residential treatment program" in Kern County.

[1] All undesignated section references are to the Penal Code.

[2] The underlying facts are not relevant to this appeal.

In October, the probation department filed a petition to revoke probation, alleging appellant violated her probation conditions because she was "[t]erminated from the [ISMIP] program on September 20, 2017, due to failure to comply." The trial court summarily revoked probation. At the contested formal revocation hearing, the only witness was appellant's parole agent, Keely Dodd. Dodd testified that, during appellant's residence in the Kern County treatment program, supervision was transferred to another parole agent, Agent Aguilara. Over appellant's hearsay objection, Dodd further testified that, in a September 2017 telephone call, Aguilara "told me that they were going to be terminating [appellant] from the program," and the reasons for the termination were "that [appellant] tested positive for methamphetamine use, and that she was noncompliant in the program." No other evidence was submitted.

The trial court found true the violation of probation alleged in the petition. In February 2018, the court sentenced appellant to three years in state prison. This appeal followed.

DISCUSSION

I. *Legal Standard*

"In reviewing the trial court's decision to admit the hearsay, or perhaps even double hearsay, testimony, we begin with the well-established principle that parole and probation revocation is not part of a criminal prosecution, and thus 'the full panoply of rights due a defendant in [a criminal] proceeding does not apply . . . .' " (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1198 (*Shepherd*).) Nonetheless, "due process requires that a defendant at a probation revocation hearing be afforded, at a minimum, certain rights, including ' "the right to confront and cross-examine adverse witnesses *(unless the hearing officer specifically finds good cause for not allowing confrontation)*." ' [Citations.] . . . [¶] A probationer's right of confrontation, however, is not absolute, and where ' "appropriate," ' witnesses may give evidence by 'affidavits, deposition, and documentary evidence . . . .' " (*Id.* at pp. 1198–1199, fn. omitted.)

Two California Supreme Court cases provide guidance on this issue. In *People v. Maki* (1985) 39 Cal.3d 707 (*Maki*), the Supreme Court held "documentary hearsay

evidence which does not fall within an exception to the hearsay rule may be admitted [at a revocation hearing] if there are sufficient indicia of reliability regarding the proffered material . . . ." (*Id.* at p. 709.) The documentary evidence at issue in *Maki* was a car rental invoice signed by the defendant and a hotel receipt, both seized from the defendant's home. (*Id.* at p. 716.) Although the case was "a close one," the evidence was sufficiently reliable to be admissible. (*Ibid.*) "The significant factor is the uncontroverted presence of defendant's signatures on the invoice"; the court also noted the invoice was "printed" and "of the type relied upon by parties for billing and payment of money." (*Id.* at pp. 716–717.)

Following *Maki,* in *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*), the Supreme Court considered the admissibility of a preliminary hearing transcript at a probation revocation hearing. (*Id.* at p. 1148.) The court distinguished *Maki,* which clarified "the standard for the admission of *documentary* evidence at a revocation hearing," from the case before it: "There is an evident distinction between a transcript of former live testimony and the type of traditional 'documentary' evidence involved in *Maki* that does not have, as its source, live testimony. [Citation.] . . . [T]he need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola,* at pp. 1156–1157.) Thus, the Supreme Court held "a showing of good cause" must be made "before a defendant's right of confrontation at a probation revocation hearing can be dispensed with by the admission of a preliminary-hearing transcript in lieu of live testimony." (*Id.* at p. 1159.) "The broad standard of 'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240),

(2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*Id.* at pp. 1159–1160.)[3]

II. *Forfeiture*

When Agent Dodd began to testify about Agent Aguilara's out-of-court statements, defense counsel objected, stating, "Hearsay." In response, the prosecutor argued, "Reliable hearsay is allowed in violation of probation hearings," and the court overruled the objection. After Dodd's testimony, during argument on the violation, defense counsel argued: "I had made a hearsay objection. I don't think that the Government has overcome their burden to establish that the hearsay was reliable in order for it to be admissible in a violation of probation hearing."

The People argue appellant forfeited her contention that the hearsay evidence required a showing of good cause to be admissible because, "when the prosecutor responded to appellant's hearsay objection by arguing reliability of the evidence, appellant made no effort to clarify that her objection was based on the absence of good cause." We disagree.

"An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds (e.g., 'relevance') . . . ." (*People v. Demetrulias*

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[3] Good cause is necessary but not sufficient to warrant admissibility: "[I]n determining the admissibility of the evidence on a case-by-case basis, the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether, instead, the former testimony constitutes the sole evidence establishing a violation of probation." (*Arreola, supra,* 7 Cal.4th at p. 1160.)

(2006) 39 Cal.4th 1, 22.) Thus, "a relevance objection does not, in itself, alert the trial court to the claim that the testimony objected to is inadmissible character evidence," and a hearsay claim will be forfeited if "at the time the evidence was admitted the defendant objected only that it was ' "incompetent, irrelevant and immaterial." ' " (*Id.* at pp. 21, 22.) Moreover, the objection must be made "*at the time the evidence is introduced*," rather than by a subsequent motion to strike or other belated means. (*Id.* at p. 22, italics added.)

Defense counsel made a timely objection on the ground of hearsay. This was not a general or "placeholder" objection, but instead alerted the court and the prosecutor that appellant contended her due process rights were violated by the use of hearsay evidence at the revocation hearing. The stated ground was sufficiently specific to preserve the same claim raised on appeal. The contention that due process requires a showing of good cause is not forfeited simply because the *prosecutor* argued the evidence was admissible because it was reliable, or because defense counsel *subsequently* (after the objection was overruled and the evidence admitted) argued the evidence was not sufficiently reliable. (See *People v. Partida* (2005) 37 Cal.4th 428, 434 ["the requirement of a specific objection . . . must be interpreted reasonably, not formalistically"].)

III. *Admissibility*

Appellant argues a showing of good cause was required before admission of Dodd's testimony, relying on *Shepherd, supra*, 151 Cal.App.4th 1193. In *Shepherd*, the defendant's probation officer "testified that Roncelli, a program administrator for [a residential treatment program], informed him appellant had been asked to leave the treatment program after smelling of, and testing positive for, alcohol consumption. Roncelli did not testify at the hearing, and no other evidence supported her alleged out-of-court statements that appellant consumed alcohol in violation of his probation. Moreover, it is not even clear from [the probation officer's] testimony whether Roncelli herself observed appellant's alleged probation violation, or whether she was simply reporting what she had been told by other, unidentified, persons at the program." (*Id.* at p. 1198.) The Court of Appeal concluded the probation officer's "live testimony

regarding a declarant's out-of-court statements," like the preliminary hearing transcript at issue in *Arreola*, is a "form[] of testimonial hearsay evidence. [Citation.] As such, we conclude the good cause standard . . . in *Arreola* is applicable, rather than the more lenient indicia of reliability standard set forth in *Maki*." (*Shepherd*, at pp. 1201–1202.) Because "Roncelli, or perhaps even an unidentified third person, was 'the sole percipient witness to the alleged probation violation, and there [was] . . . no showing that [she] was unavailable or that other good cause existed for not securing [her] live testimony,' " the admission of the probation officer's testimony was in error. (*Id.* at p. 1202.) The Court of Appeal emphasized that "the good cause standard applies equally to [the probation officer's] testimony regarding Roncelli's statement that appellant failed an alcohol test." (*Ibid.*)

The People contend only a showing of reliability was needed, relying on *People v. Abrams* (2007) 158 Cal.App.4th 396 (*Abrams*). *Abrams* considered the admissibility of a probation officer's testimony that the report of another probation officer " 'indicates that [the defendant] was ordered to report on June 13th, 2006, but never showed up and has—did not contact the probation officer at that time or since then.' [The witness] then testified that he had reviewed the probation department computer records, the last time a few days before testifying. He explained how calls are logged into the system and that the records showed defendant had not called the probation office." (*Id.* at p. 404.) The testifying probation officer had the other officer's report with him on the stand, but the record was unclear whether the report was admitted into evidence. (*Id.* at p. 404 & fn. 4.) The Court of Appeal concluded the evidence was akin to that in *Maki*: "The presence of [the probation officer who authored the report] likely would not have added anything to the truth-furthering process, because he would be testifying to a negative: that defendant did not make any appointments and that [the authoring probation officer] had not spoken to defendant. [Citation.] Adding a computer custodian of records to recount the process of logging in calls likewise would have been of little assistance. The credibility of those two witnesses was not critical to the court's determination whether defendant had violated his probation." (*Abrams*, at p. 404.) Thus, the inquiry was whether the evidence

had "sufficient 'indicia of reliability' " to warrant admission. (*Ibid.*) The court cautioned, however, "This is not to say that everything in a probation report is necessarily admissible at a violation hearing. Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely falls on the . . . *Arreola* side of the line. [Citations.] We hold the rule is otherwise where the evidence involves more routine matters such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead on the record of his or her own action.' " (*Id.* at p. 405.)

We agree with appellant that this case is closer to *Shepherd* than *Abrams.* The People contend *Shepherd* is distinguishable because "the basis for appellant's revocation here concerns her status in the program, rather than any alleged drug use." The People misapprehend the nature of the trial court's violation finding. The court found true the allegation that appellant was "[t]erminated from the [ISMIP] program on September 20, 2017, *due to failure to comply*." (Italics added.) While appellant's "status" of no longer being enrolled in the program may be a "routine" matter, akin to the appointment records at issue in *Abrams*, such a status could be attained by appellant's successful completion of the program. Thus, status alone does not establish a probation violation. Instead, the critical finding is that appellant failed to comply with the program. The only such evidence is Dodd's testimony that Agent Aguilara told her appellant "tested positive for methamphetamine use, and . . . was noncompliant in the program."

It is unclear whether Agent Aguilara had personal knowledge of appellant's methamphetamine test and/or noncompliance in the program, or whether Aguilara was simply reporting information received from someone at appellant's program. Thus, as in *Shepherd,* Aguilara, "or perhaps even an unidentified third person, was 'the sole percipient witness to the alleged probation violation.' " (*Shepherd*, *supra,* 151 Cal.App.4th at p. 1202.) It is also unclear whether appellant was terminated solely because of the failed drug test, or whether additional unspecified noncompliance was a factor in her termination. In any event, neither a drug test nor unspecified noncompliant

behavior is akin to "routine matters such as the making and keeping of probation appointments, restitution and other payments" (*Abrams, supra,* 158 Cal.App.4th at p. 405) or "foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts" (*Arreola*, *supra*, 7 Cal.4th at p. 1157). Instead, admissibility of the testimony is governed by *Shepherd,* which found a hearsay statement that the defendant "had been asked to leave the treatment program after smelling of, and testing positive for, alcohol consumption" was "testimonial hearsay evidence" requiring a showing of good cause. (*Shepherd,* at pp. 1198, 1201–1202; see also *id.* at p. 1202 ["the good cause standard applies equally to [the probation officer's] testimony regarding Roncelli's statement that appellant failed an alcohol test."].)[4]

We emphasize that no documentation was submitted—for example, a laboratory report of appellant's drug test or a report from appellant's treatment program—nor was Dodd's testimony based on any documentation. (Cf. *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1410, 1413 [laboratory report analyzing substance the defendant was selling was "routine documentary evidence" admissible under *Maki* standard]; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066 [report from program manager of the defendant's drug treatment program stating the defendant " 'completed 0 of 20 Sessions' " and "had been terminated from the program due to 'Too Many Absences' " admissible under *Maki* standard].) Under such circumstances, a showing of good cause was required before the admission of Dodd's hearsay testimony. No such showing was made; the People do not contend otherwise. We conclude the trial court erred in admitting the hearsay testimony. Because the hearsay evidence was the only evidence of

[4] As in *Shepherd,* there is "no evidence corroborating the test results or indicating the test was performed during the regular course of a reliable laboratory's business. In fact, no evidence whatsoever was offered regarding the type of test or who performed it." (*Shepherd*, *supra,* 151 Cal.App.4th at p. 1203.)

appellant's probation violation, the erroneous admission was prejudicial and requires reversal.[5]

DISPOSITION

The order revoking appellant's probation is reversed.

[5] Appellant also contends the trial court erroneously denied her certain custody credits when it sentenced her following revocation. Our reversal of the probation revocation—and therefore the subsequent prison sentence—renders appellant's credits challenge moot.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BURNS, J.

(A153658)